APPENDIX D

[NOTE: Appendix D consists of relevant portions of the District Court's charge to the jury in Case No. 1800, styled *Arnold G. Pessin and Rex C. Ellsworth v. Keeneland Association, University of Kentucky Research Foundation and The Bank of New York.*]

Charge of the Court

[295] Swinford, J:

The Court: Let the jury come in, Mr. Marshal.

(Reporter's Note: Jury Present.)

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In the first place this case is what is known as an antitrust case, [sic.] Now, an antitrust case is a creature of statute. In essence it is a relatively simple thing and I shall attempt to reduce it for you to its simplest terms.

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And so in 1890 there was enacted into the law of the United States what is known as the Sherman Act, the Sherman Antitrust Act, which says simply this, that no person or corporation or group of corporations or people can combine to prevent another person from engaging in business.

I will give you an illustration. Let us say a town of some 1,500 people had 10 grocery stores in it and another person wanted to start a grocery store in that town. If those men who were already in business got together and said, "This newcomer hasn't got too much financing or too much ability, so in order to keep him from going into business, we will buy up the available sites that he

might use, or if he goes into business we will reduce prices so that he cannot meet the competition and we will put him out of business," such an arrangement would be a violation of the Sherman Antitrust Law. In other words, that a group of individuals or corporations cannot com[296]bine and it is unlawful for them to combine and it is a penal statute. They are subject to a penalty if they do combine to either prevent the establishment of a new business or to put a business that was already established into failure.

Now, that very simply is an illustration of what this charge in this civil action is.

In 1912 Congress came along and passed the Clayton Act. The Clayton Act is a method whereby they put a penalty for creating an unlawful restraint of trade or monopoly, fix the damages that might be recovered to one who was so abused by other business enterprises.

So you have here and the thing that you are going to have to think about as I give you this charge and that you are going to have to finally determine is, did these three defendants intentionally and knowingly enter into an arrangement whereby they caused this farm, the Maine Chance Farm, to be kept from the plaintiffs to prevent them from buying it in order to continue a monopoly or a restraint of trade, the sale of thoroughbred horses.

That's your case. If these three, and I have to give you certain rules of law to guide you, you are to decide from this evidence, looking at this evidence specifically and also as a panoramic view of it, the whole evidence, the sense that you get out of this whole case, is the evidence sufficient to establish that fact within the

meaning of the rules of law these three defendants or any of them or any one of them in company with any other person or corporation, even though not named as a defendant in this lawsuit, cause this farm to be taken away by this method and kept from these plaintiffs in order to prevent them from going into a competitive horse selling arrangement opposed to Keeneland Association?

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Now, this case is a damage suit. It is claimed by the plaintiffs, Dr. Pessin and Mr. Ellsworth, that they have been damaged by the acts of these three defendants. [297] So consequently they have the burden of proving what they claim. If no proof was offered in the case, then it would have to be dismissed.

So the responsibility rests primarily upon these two plaintiffs to establish a preponderance of the evidence that what they claim is true.

They thereby must sustain what is known in law as the burden of proof, and that is not only in law but in everyday language.

The burden of proving what they say has caused them to be damaged by a preponderance of the evidence and burden of proof.

You are instructed that the burden is on the plaintiff in an action such as this to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of these plaintiffs' claim by a preponderance of the evidence in the case, you should find for the defendants.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so.

In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may unless otherwise instructed consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

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Now, as I stated to you at the outset, before you can find a verdict against these defendants or any of them you must believe that that defendant intentionally entered into this arrangement, in other words, that he did it knowingly and intentionally.

[298] So far science has not reached a point where we can open up a person's head and look into it and see what he intended. So the law has to use the next best rule and that is that a person is presumed to intend the natural consequences of his own deliberate acts, and this definition that I am going to give you is to guide you in determining whether or not intention plays a part in your application of this evidence, and reasonable inferences drawn from it to these defendants and each of them.

Intent is the purpose or aim or state of mind with which a person acts or fails to act.

Ordinarily it is reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

So, in the absence of evidence in the case which leads the jury to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done, or knowingly omitted, by such person.

An act, or a failure to act, is knowingly done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Intent may be proved by indirect or circumstantial evidence.

Indeed, it can rarely be established by any other means. While witnesses may see and hear, and so be able to give direct evidence of what a person does or fails to do, of course, there can be no eye witness account of the state of mind with which the acts were done or omitted, but what a persons does, or fails to do, may indicate either intent or lack of intent to act, or to fail to act.

Unless otherwise instructed, in determining any issue involving intent, the jury may consider all the facts and circumstances in evidence in the case, which may aid determination of state of mind.

[299] Now, you will have heard the word "proximate cause," whether or not this failure to acquire this farm by the plaintiffs was the proximate result of the unlawful acts of the defendants.

In other words, it must have been the proximate cause that kept this farm from being acquired by these plaintiffs.

Now, proximate cause is defined as, an injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probably consequence of the act or omission.

In other words, even though they didn't get the farm, and the University of Kentucky did get it, unless you think that fact, the University of Kentucky got the farm and acquired it by this arrangement, you must believe that that was the proximate cause of the claimed injury to the plaintiffs and that injury, if any, was not from something else.

Now, I want to caution you that a conspiracy or an unlawful combine or an antitrust arrangement must usually be proved by a great number of facts and circumstances or accumulation of evidence, circumstantial evidence and not evidence of the most direct and positive kind.

Perfect proof would be if you could find three persons or four persons, or whoever the accused might be, sitting down around a table drawing up an agreement

saying, "We hereby agree to keep this person from acquiring this property."

But that, of course, I would say, you practically never are able to establish.

So you have to arrive at what they did by a number of facts and circumstances which taken as a whole and considered as a whole produce in your mind an inference that they violated the law, and that they did what the plaintiffs say that they did.

[300] So the term "circumstantial evidence" plays a big part in a conspiracy, an alleged conspiracy such as this.

Before any act which the plaintiffs are required to prove as a fact can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inference to the contrary can be drawn from the same circumstances.

In other words, it must be a positive circumstance, not just an imaginary thing.

You are charged that if two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the facts sought to be proved, and the other inconsistent therewith, you may not infer the facts sought to be proved from such circumstances alone.

If two inferences can be reasonably drawn from the same facts, one pointing to wrongful conduct and the other innocent conduct, then this would mean that

if the inferences are in balance, there would not be the preponderance of the evidence the law requires before you can find a defendant liable, and it is your duty to infer that which indicates innocent conduct.

It will have to take this a little slower, because I don't want to leave out any of these definitions.

In order to find a conspiracy, you must find that a conspiracy existed between two or more persons or corporations. A corporation cannot conspire with itself or its officers or employees; and a single corporation, its officers and employees and agents may not be found guilty of a conspiracy.

In other words, you have to find it is between two separate entities. It can't just be agents or employees within one corporation.

Now, there must be knowledge. A person can't be held accountable for something that he did, even though he [301] did it, if he didn't know that he was doing it. He must have knowledge.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws. You don't have to go and say, "Well, I have knowledge that I am violating the antitrust laws." They have knowledge of the acts that they are committing if they do permit such acts.

Unless the evidence in the case leads the jury to a different or contrary conclusion, the presumption is that every person knows what the law forbids, and what the law requires to be done.

If the jury should find from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiffs' Complaint was knowingly formed, and that the defendants, or any of them, knowingly became members of the conspiracy, then the fact that the accused may have believed, in good faith, that what was being done was not unlawful would not be a defense in this case.

In other words, he doesn't have to go into the question of whether it was lawful or unlawful, if he knew what he was doing and doing it at the time.

Mere passive knowledge of the existence of the combination or conspiracy, should you find one did exist, or of the illegal acts of others in connection therewith is not in itself sufficient to make the one securing such knowledge a member of the unlawful association.

The evidence must satisfy you, not only that he had knowledge of the existence of the conspiracy and its unlawful purpose, but that with such knowledge he knowingly participated to some extent with the members of the combination with the purpose of aiding in the common design.

Until such knowledge and connection are shown, a defendant is not bound by the declaration or statements of any other member.

Now, I gave you that instruction during the progress of the trial. It is simply that during the trial the Court has permitted the introduction of evidence concerning the ac [302] tions and statements of each of the defendants, and their officers and agents with the

specific admonition to the jury that the members of the jury must not consider that evidence against the other defendants.

Now, it is my duty to explain to you the legal requirements with respect to your consideration or disregard of such evidence.

Inasmuch as there can be no liability on the part of the defendants unless a conspiracy is proved, you must disregard all of such evidence unless you first find by other and disassociated evidence in the case that the conspiracy claimed by the plaintiff existed.

In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case.

Specifically, however, unless you first find clear proof of a conspiracy by other and disassociated evidence, you must not consider against the defendant University of Kentucky Research Foundation any statements by witnesses Haggin, Wachs, Swinebroad, or any other alleged conspirator not made to or in the presence of some officer of the Foundation.

In other words, members of the jury, a conspiracy, as I will give you that definition a little later on, is an agreement to commit an unlawful act or an agreement between two or more persons to commit an unlawful act, commit a lawful act in an unlawful way.

The statements of any one of those conspirators may be used against all of the conspirators if you first find that a conspiracy had actually been formed and was in operation, and the statement was made during

the life of the conspiracy in furtherance of its objects and purposes.

If you believe that, then you can use that statement or statements, however many there may be against all of the conspirators. They are all bound by whatever one of them may have said. But you cannot use that statement itself as a part of the establishment of the conspiracy. You [303] must believe that the conspiracy was formed from evidence other than using the statement as a part of the evidence from which you draw the inference that there was a conspiracy or determination that there was a conspiracy.

Statements or declarations made outside of court by one person shall not be considered as evidence against any other person or defendant herein who was not present at the time and heard the statement or declaration made unless three distinct prerequisites are met:

First, that the statement or declaration was made in furtherance of the alleged conspiracy;

Second, that it was made during the pendency of the alleged conspiracy; and

Thirdly, that there is independent proof of the existence of the alleged conspiracy and that both the declarant and such other person or defendant were members thereof.

In determining whether or not such alleged conspiracy existed and whether or not such other person or defendant was a member thereof, you shall not consider any such statements or declarations made out of

the presence or hearing of such other person or defendant.

The mere declaration of one conspirator cannot alone prove that any other is a party thereto and before any such statements or declarations can be considered as evidence against either or any of the defendants other than the one making them, the facts and circumstances must be such as to satisfy you that a conspiracy had been formed and then existed, and the defendants against whom such declarations are sought to be used were parties thereto.

Now, one other thing. This is a matter which I am not sure is included in some of these other instructions that I have given you, and I want to give it to you now for fear I might overlook it.

The plaintiffs must prove that they had the preparedness and capacity to engage in the business of conducting a horse auction sales company.

[304] However, preparedness and capacity to engage in a business means more than the intention to do so and an ability to buy the necessary facilities.

In determining whether or not the plaintiffs had the preparedness and capacity to engage in the horse auction sales business, it is proper for you to consider the background and experience of the plaintiffs, any affirmative action taken on their part to engage in the proposed business, their ability to finance the business, the purchase of equipment and facilities necessary to engage in the business from which they allege that they were excluded, and the consummation or lack of

it of any enforceable contract for the acquisition of the business, necessary equipment or facility.

Now, I am going to give you these instructions as rapidly as I can. I hestitate to prolong this, but I must do it.

Andrew Jackson was a federal judge down in Nashville, Tennessee, and he had but one instruction that he gave to the jurors, and that was to go out and do right between these people. And I sometime think that it might be not a bad instruction to use all the time. But we do have to give you these rules in order that you may get a summation of law applying it to the evidence.

The plaintiffs in this case seek damages for injuries claimed to have been suffered or sustained as a result of alleged violations of the defendants of the antitrust law of the United States.

Specifically, the plaintiffs claim, first, that the defendants have combined and conspired to prevent the plaintiffs from going into the business of operating regular auction sales for thoroughbred horses in Kentucky and thus have unreasonably restrained interstate trade and commerce in the production, training, racing and sale of thoroughbred horses.

Don't let that word "interstate" cause you any trouble, because it is admitted in this case that these horses in this kind of business are moved from state to state and place to place in the country.

[305] Second, that the defendants have monopolized and conspired and attempted to monopolize interstate

trade and commerce in the thoroughbred race horse industry.

Third, that the defendant's activities and conspiracy have proximately caused damage to the plaintiffs by preventing them from engaging in the auction sale of thoroughbred race horses.

This action is brought under the provisions of the United States statute known as the Sherman Antitrust Act and the Clayton Act.

Section 1 of the Sherman Antitrust Act, dealing with restraint of trade, provides:

"Every contract, combination or conspiracy in restraint of trade or commerce is illegal."

Section 2 of the Sherman Antitrust Act declares:

"Every person who shall monopolize, or attempt to monopolize, or conspire with any other person to monopolize any part of the trade or commerce shall be guilty of a violation of the law."

Section 4 of the Clayton Act authorizes:

"Any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws may sue therefor in an action for damages."

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of every kind and character.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage to the fullest extent practicable free and open competition in the marketplace; and to

prevent the accomplishment of a monoply in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open [306] market in interstate trade and commerce, constitutes an unreasonable restraining of interstate trade, and is a violation of the Federal Antitrust Laws.

The phrase "in restraint of interstate trade" means in restraint of trade and commerce which takes place between persons of business organizations in one state and those in another state. This is to say, trade and commerce which moves or flows or takes place, not wholly within the boundaries of a single state, but across state lines from one state into one or more other states.

To restrain interstate trade and commerce means, then, to interfere unreasonably with the ordinary, usual, and freely-competitive pricing or distribution system of the open market in interstate trade and commerce.

The amount or quantity or value of the interstate commerce involved or affected by an unreasonable restraint of trade is immaterial.

The Sherman Antitrust Act brands as unlawful any contract or combination or conspiracy, which would operate to restrain unreasonably any interstate trade and commerce, regardless of how small in amount the quantity was.

A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful

purpose, or to accomplish some lawful purpose by unlawful means.

So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member.

The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to [307] be, or the details thereof, or the means by which the object or purpose was to be accomplished.

What a preponderence of the evidence in the case must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods set forth in the plaintiffs' Complaint were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such.

What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed, and that one or more of the means or methods described in the Complaint were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiffs' Complaint; and that two or more persons, including one or more of the defendants, were knowingly members of the conspiracy alleged in the Complaint.

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent.

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One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. I don't want to confuse you with my instruction. In other words, you don't have to know the whole plan, but if you know that such a conspiracy or arrangement or plan is in existence, then it is not necessary to know all of the details of it.

On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

[308] Before you may find that a defendant or any other person has become a member of a conspiracy, a preponderance of the evidence in the case must show that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing participant or a conspirator.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, you are not to consider what others may have said or done. That is to say, the membership or a defendant, or any other person in a conspiracy must be established by evidence in the case as to his own conduct, what he himself knowingly said or did.

A conspiracy to exclude a competitor from any substantial market in or affecting interstate trade or commerce, such as is alleged in the Complaint, is without more an unreasonable restraint of trade.

Now, in your consideration of the evidence in the case as to the conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the Complaint.

If you conclude that the conspiracy did exist, you should next determine whether or not the defendants, or any of them, were knowingly members of the conspiracy.

[309] If it appears from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiffs' Complaint was knowingly formed, and that the defendants, or one or more of them, knowingly became members of the conspiracy, either at the inception or beginning of the plan or scheme, or afterwards, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws.

Unless the evidence in the case leads the jury to a different or contrary conclusion, the presumption is that every person knows what the law forbids, and what the law requires to be done.

If you find from a preponderance of the evidence that the conspiracy alleged in the plaintiffs' complaint was knowingly formed, and that the defendants, or any of them, knowingly became members of the conspiracy, then the fact that the accused may have believed, in good faith, that what was being done was not unlawful would not be a defense in this case. I believe I gave you that instruction before. I'm sorry.

In addition to a conspiracy to exclude plaintiffs from the thoroughbred horse auction sales business, the plaintiffs further allege that the defendants violated the federal antitrust laws by conspiring and monopolizing, and conspiring and attempting to monopolize, interstate trade and commerce in the thoroughbred horse auction sales business in Kentucky.

In this case the defendants conspired and have monopolized, within the meaning of the antitrust laws, if it appears from a preponderance of the evidence in the case, first, that they have knowingly combined or conspired either to obtain, or to maintain, the power either to remove, or to exclude or keep out, competitors from the field of competition.

[310] Second, that they possess the necessary power to remove or exclude.

Third, that they have the intent to exercise their power to remove or exclude.

Of course, if the power to remove or exclude competitors has been exercised, and if as a result of the exercise of such power one or more competitors have been removed or excluded, some actual monopolization has already occurred; but it is not necessary that competition actually be removed or excluded from the field of competition, before a combination or conspiracy can be found to have monopolized.

In other words, in this case it is not intended to put anybody out of business, but the claim here that they kept these plaintiffs from going into business, which is a violation of the law, if you believe that that is what occurred.

Monopolization by a combination or conspiracy may be found to exist, whenever it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

The term "attempt to monopolize," as used in the federal antitrust laws, involves two essential elements.

First, an intent to monopolize and, second, some act done in furtherance of that intent, but insufficient actually to produce the intended monopoly.

In order to find an attempt to monopolize, both elements, the intent and the act, must appear, and must together result in a reasonable probability that monopolization will sooner or later occur.

Both a conspiracy to monopolize or attempt to monopolize the thoroughbred horse auction sales business and a conspiracy to exclude plaintiffs from the thoroughbred horse auction sales business are unlawful, even though the conspiracy may be formed or engaged in for what may appear to the conspirators to be laudable motives.

A conspiracy to monopolize or attempt to monopolize the thoroughbred horse auction sales business and a con-[311]spiracy to exclude plaintiffs from the thoroughbred horse auction sales business, such as are alleged in plaintiffs' Complaint, cannot therefore be justified under the federal antitrust laws, even though the conspiracy may have been formed or engaged in to prevent or halt ruinous competition or to protect the defendant Keeneland Association's share of the market.

In order to prove the essential elements of the plaintiffs' claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts:

First, that the defendants have violated the federal antitrust laws in one or more of the particulars alleged and, second, that the defendants' violations have been a proximate cause of some injury and consequent dam-

age sustained by the plaintiffs in their business or property.

All three defendants are charged with a joint enterprise to deny the plaintiffs the right to acquire Main Chance Farm, thereby, as the plaintiffs claim, denying them the right to exercise their free enterprise privilege of establishing and operating a thoroughbred auction sale with related business *or* training horses for racing, educating jockeys, and so forth.

The plaintiffs also claim that these defendants by their actions sought to create a monopoly in the interest of the defendant Keeneland Association, in conducting auction sales for thoroughbred horses.

You are instructed that even though you may believe that all three of the defendants or any two of them did not in concert with each other commit acts toward the establishment of such a monopoly, if any, yet if you believe that any one of the defendants in concert with any other person or corporation by its acts and conduct prevented the plaintiffs from purchasing the farm with the intention of monopolizing the thoroughbred horse auction business, you may find for the plaintiffs against those defendants or that defendant whom you believe is guilty [312] of such conduct as shown by a preponderance of the evidence and reasonable inferences which may be drawn from it.

If you find that the Research Foundation was acting in its own self-interest and in the interests of the University, and that the actions of the Foundation in this case were prompted solely by its desire to serve the University, free and independent of any agreement to restrain trade in interstate commerce, then you must

find that there was no conspiracy and enter a verdict for the defendant, University of Kentucky Research Foundation.

If you should find, from a preponderance of the evidence in this case, that the plaintiffs are entitled to a verdict, the law provides that the plaintiffs are to be fairly compensated for all damage, if any, to their business and property, which was proximately caused by the defendants' conduct in violation of the federal antitrust laws.

In arriving at the amount of the award, you should include any damages suffered by the plaintiffs because of lost profit. That is to say, profits which the plaintiffs would have made, but for violation by the defendants of the federal antitrust laws.

If you should find, from a preponderance of the evidence in the case, that damage to plaintiffs' business, and property, such as a loss in the profits, was proximately caused by the defendants' illegal conduct complained of, then the circumstances that the precise amount of plaintiffs' damages may be difficult to ascertain should not affect plaintiffs' recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount.

Of course, it is not possible to draw a blueprint of what might happen had these men gone on into this business. They may have made money, big money, they may have made little money. They may have made no money, or they may have lost money, but that must necessarily be taken into consideration. But that fact alone simply be- [313] cause it is difficult to prove should not deny a person who is offended in this way,

if you believe that these plaintiffs were, the right to redress, and so the law does not deny simply because it is difficult to arrive at or cannot be done with exactness or precision, them by reason of that fact the right to seek recovery.

On the other hand, the plaintiffs are not to be awarded purely speculative damages. You understand that. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence in the case for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult to ascertain.

In arriving at the amount of any loss of profits sustained by plaintiffs, the jury is entitled to consider any evidence in the case bearing upon the issue.

Any award to the plaintiffs should be against only such of the defendants as you believe from the evidence violated the antitrust laws of the United States as described above, not to exceed the sum of $10 million. I think I went over that with you, but that means you may find against all of them, you may find against two of them, and you may find against one of them, if you believe that one, from the testimony, did not conspire with the other two co-defendants, but with some other person within the meaning of these rules that I have given you.

The issues to be determined by the jury in this case are these:

First, has one or more of the defendants violated the antitrust laws of the United States by combin-

ing or conspiring to exclude the plaintiffs from the thoroughbred horse auction sales business, or by conspiring to attempt to monopolize the thoroughbred horse auction sales business in Kentucky.

If your answer to this question 1 is no, as to all defendants, then you should return a verdict in favor of all of the defendants.

[314] If your answer to that question is yes, as to one or more of the defendants, then you have a second issue, was such violation of the federal antitrust laws a proximate cause of any injury or damage to the plaintiffs' business or property.

If your answer to that question is no, you should return a verdict for the defendants, but if your answer is yes, you then should return a verdict in favor of the plaintiffs against one or more of the defendants for such damage to plaintiffs' business or property as you find, from a preponderance of the evidence in the case, has been proximately caused by the conduct of the defendants in violation of the federal antitrust laws.

There has been some evidence offered in this case that there were other farms equally adaptive to the purposes to which the plaintiffs allege they proposed to put the Maine Chance Farm.

You have a right to consider that fact in determining the question of good faith on the part of the plaintiffs in their plan to establish a thoroughbred auction sale and the facilities which they allege were to accomplish it, if you believe that there were other suitable locations in this locality.

In the event you should find that the plaintiffs are entitled to recover damages, you may also consider this fact in mitigation of damages.

You are further instructed, however, that even though you may believe that the plaintiffs could have found something equal or better for their avowed enterprise, that is not a defense to their claim.

It is a violation of the antitrust law as I have defined it to you to prevent the plaintiffs from obtaining this particular farm in order to compete in the thoroughbred auction sales with the Keeneland Association.

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